Louisiana Law Review

Volume 35 | Number 2
The Work of the Louisiana Appellate Courts for the 1973-1974 Term: A Symposium
Winter 1975

Procedure: Postconviction Procedure

Cheney C. Joseph Jr.
Louisiana State University Law Center

POSTCONVICTION PROCEDURE

*Cheney C. Joseph, Jr.**

DIRECTED VERDICT—TOTAL LACK OF EVIDENCE

In *State v. Patterson*,[1] the supreme court set aside defendant's conviction of manslaughter and ordered the trial court to enter a judgment of acquittal, finding a total lack of evidence to prove that the defendant's actions were not justified under article 20 of the Louisiana Criminal Code.[2] The *Patterson* court followed the rule of *State v. Douglas*[3] that the trial court may grant a directed verdict in a jury case only when the state fails to present any evidence of the crime or an essential element thereof.

The facts of *Patterson* are significant. The defendant and the decedent attended a social event which resulted in an encounter between the two men. Decedent drew a knife and chased defendant. Following defendant's escape, decedent apparently returned because a subsequent encounter and chase took place. The defendant then fled to his automobile, with the decedent following in pursuit. Defendant obtained a shotgun from the trunk of his car and warned decedent to stop. When decedent disregarded the warning and advanced, defendant fired a shot, killing him. Summarizing the evidence presented, the court said that after reviewing the testimony of the state's witnesses, it could not find "one shred of evidence that the homicide was not justifiable."[4]

The court based its reversal on two significant determinations. The first is that the state bears the burden of proving that a homicide is not justifiable.[5] The second is that the court has constitutional authority to reexamine the jury findings that the defendant did not "reasonably believe that he [was] in imminent danger of losing his life or receiving great bodily harm and that the killing [was] necessary to save himself from that danger . . . ."[6] From the standpoint

*Assistant Professor of Law, Louisiana State University.

1. 295 So. 2d 792 (La. 1974).

2. LA. R.S. 14:20 (1950) provides in part: "A homicide is justifiable: (1) When committed in self-defense by one who reasonably believes that he is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself from that danger . . . ."

3. 278 So. 2d 485 (La. 1973).

4. 295 So. 2d at 794.

5. *Id. See also* State v. Carter, 227 La. 820, 80 So. 2d 420 (1955); State v. Thornhill, 188 La. 762, 178 So. 343 (1938); State v. Disotell, 181 La. 149, 158 So. 825 (1934). State v. Richardson, 175 La. 823, 144 So. 587 (1932); State v. Conda, 156 La. 679, 101 So. 19 (1924).

6. LA. R.S. 14:20(1) (1950).

of appellate review of a trial court's refusal to grant a directed verdict, the second determination is particularly interesting in view of the court's earlier decision in *State v. Brewer*[7] and later decision in *State v. Jones*.[8]

Under Article VII, § 10 of the Constitution of 1921, the supreme court's appellate jurisdiction in criminal cases extends to questions of law alone. Article V, § 5 of the Constitution of 1974 continues this rule. However, the court has held that total lack of evidence is a question of law, and is therefore properly an issue on appeal.[9]

In *State v. Brewer*,[10] affirming the refusal of a trial judge to provide an indigent appellant with certain portions of transcript, the court justified its finding that no error had been committed with the following:

> In our state, the scope of appellate review in criminal matters covers 'questions of law alone'. Determination of the factual questions of guilt or innocence, *such as whether or not the defendant acted in self defense* or in the heat of passion upon provocation, or was under the influence of alcohol, as he alleges inter alia, is within the sole province of the jury.[11]

In *State v. Jones*,[12] the defendant was prosecuted for negligent homicide[13] in connection with an automobile accident in which defendant, attempting to pass another car, was forced to pull quickly back into his lane of traffic due to the approach of another vehicle from the opposite direction. The right front of defendant's car struck the left rear of the other car, apparently causing the other car to leave the roadway. A passenger in the other car was killed. The court noted that there was no evidence that the defendant had taken any intoxicants.

Analyzing the concept of criminal negligence,[14] the court said that it was "clear that proof of ordinary negligence does not constitute proof of criminal negligence"[15] and that the state was required

7. 263 La. 113, 267 So. 2d 541 (1972).

8. 298 So. 2d 774 (La. 1974).

9. *See, e.g.*, State v. Douglas, 278 So. 2d 485 (La. 1973).

10. 263 La. 113, 267 So. 2d 541 (1972).

11. *Id.* at 122, 267 So. 2d at 544. (Emphasis added.)

12. 298 So. 2d 774 (La. 1974).

13. LA. R.S. 14:32 (1950).

14. LA. R.S. 14:12 (1950) provides: "Criminal negligence exists when, although neither specific nor general criminal intent is present, there is such disregard of the interest of others that the offender's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances."

15. 298 So. 2d at 776.

"to show more than a mere deviation from the ordinary standard of care."[16] Although the state's case did support the finding that the defendant's negligence caused the accident, this was at best only ordinary negligence. Finding a total lack of evidence of criminal negligence, the court reversed and remanded to the trial court to enter an order of acquittal.

Two earlier cases, neither of which is cited in the court's opinion, confronted the same problem. In *State v. Minor*,[17] the court affirmed the defendant's conviction of negligent homicide, resulting from an auto wreck. The court, reviewing all of the evidence, found "some evidence adduced which could well justify the conclusion that the collision and death in question resulted from criminal negligence on the part of this defendant."[18]

The court in *Minor* distinguished its earlier decision in *State v. Harrell*.[19] In *Harrell*, again a negligent homicide prosecution resulting from an automobile accident, the defendant, a seventeen year-old, struck a child who ran into the street. Although the court found that the defendant's conduct in operating his vehicle in the manner in which he did at the time of the accident constituted "an error of judgment. . . . it [was] not criminal negligence so as to warrant a conviction."[20]

Although the court recognizes and discusses a distinction between total lack of evidence and insufficiency of evidence, it becomes very difficult to distinguish between these two concepts when the court is dealing with such findings as "gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances"[21] or the defendant's reasonable belief

16. *Id.*

17. 241 La. 339, 129 So. 2d 10 (1961).

18. *Id.* at 342, 129 So. 2d at 11-12. The facts are of interest: "[A]t and near the site of the accident (and at the time thereof) U.S. Highway 51, constructed with a black top surface, was undergoing repairs, was bumpy, and was exceedingly wet because of rain. Between that point and Ponchatoula to the north were signs warning that the road had a speed limit of 45 miles per hour and was 'slick when wet'. Further, one E.M. Wegmann testified that while he was driving his automobile in a southerly direction at approximately 43 miles per hour and was following another car about 100 feet ahead, the defendant steered his Mercury into the left lane, passed the mentioned two vehicles very quickly and at a speed considerably faster than they were traveling, cut sharply to the right when 'just barely ahead of the front car' and went completely off the road, and then 'cut back across (the highway's center) at about a 75 degree angle', thereby causing his machine to strike the Willys station wagon which was proceeding toward the north in its proper traffic lane." *Id.* at 342-43, 129 So. 2d at 12.

19. 232 La. 35, 93 So. 2d 684 (1957).

20. *Id.* at 38, 93 So. 2d at 685-86.

21. LA. R.S. 14:12 (1950).

that "he is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself from that danger."[22]

In *Jones* and *Patterson*, the court was willing to review the facts in the record under the total lack of evidence standard. The court did not, as suggested in *Brewer*, simply view such questions as within the sole province of the jury. What "total lack of evidence" means to the supreme court in a particular case will depend upon an analysis of the circumstances of that case. Clearly the concept does not envision the court's engaging in credibility choices. However, distinguishing between "mere insufficiency" on the one hand and "total lack of evidence" on the other demands a full review of all of the evidence, particularly in such cases as those discussed where the issue is whether there is "any evidence" on the issue of "reasonableness." Since the court has embarked upon an area that requires careful review of facts, it seems that in such cases the court's inquiry comes close to examining the sufficiency of the evidence to support the verdict of a reasonable jury rather than applying the standard of a total lack of evidence. Although the court in *State v. Douglas* said that "[i]n Louisiana . . . insufficiency of evidence is not a question of law and may not be reviewed by this court,"[23] *Jones* and *Patterson* show how that distinction can become blurred.

DIRECTED VERDICT—STANDARD FOR TRIAL COURTS

State v. Douglas[24] interpreted article 778 of the Code of Criminal Procedure so as to partially overrule *State v. Hudson*,[25] which held that the directed verdict in jury cases was unconstitutional. *Douglas* recognized a limited application of directed verdicts to jury trials. The court held that the statutory authority of the trial court to direct a verdict of acquittal "if the evidence is insufficient to sustain a conviction"[26] refers to a situation where the state has produced no evidence to prove an essential element of the crime. In such a situation an acquittal is in order because total lack of evidence is a question of law, and thus no issue of fact is taken from the jury.

The 1974 Constitution has not continued the provision of Article XIX, § 9 of the Constitution of 1921 that the jury are the judges of the law and the fact relating to guilt or innocence. An interesting

22. LA. R.S. 14:20 (1950).
23. 278 So. 2d 485, 490 (La. 1973).
24. 278 So. 2d 485 (La. 1973).
25. 253 La. 992, 221 So. 2d 484 (1969).
26. LA. CODE CRIM. P. art. 778.

question arose when the court in *Douglas* found that article 778 was not, in fact, unconstitutional after the court in *Hudson* said that it was.[27] An even more interesting question arose at midnight December 31, 1974 when the Constitution of 1974 took effect. Article XIV, § 18(A) of the Constitution of 1974, provides that "[l]aws in force on the effective date of this constitution, *which were constitutional when enacted* and are not in conflict with this constitution, *shall remain in effect* until altered or repealed or until they expire by their own limitations." (Emphasis added.)

Courts will have to decide whether this provision fully revives article 778 or whether it requires the *Douglas* interpretation to limit the application of article 778 unless the provision is reenacted by the legislature. The interpretation was made, of course, in light of Article XIX, § 9 of the Constitution of 1921, and was necessary to preserve the constitutionality of the statute.

The issue may never be resolved by the supreme court. If a trial court after January 1, 1975 directs a verdict of acquittal because the state's evidence is "insufficient to sustain a conviction," that ruling is not appealable by the state.[28] If the trial court refuses to direct a verdict of acquittal although the evidence falls within the "insufficient" category but not the "total lack of evidence" category, the denial may be unreviewable by the supreme court because no question of law is presented.

The writer hopes that trial courts will give full effect to article 778 after January 1, 1975. Trial courts will undoubtedly exercise sound discretion in taking cases from the jury. However, justice requires that it be done if the evidence is "insufficient to sustain a verdict."

MOTION FOR NEW TRIAL

In *State v. Jones*,[29] the court instructed the trial court that when passing on the defendant's motion for a new trial alleging that "the verdict is contrary to the law and the evidence,"[30] its duty is to decide whether or not the verdict was unsupported by the evidence. The

27. *See* Note, 34 LA. L. REV. 851 (1974).

28. LA. CODE CRIM. P. art. 912(B) provides in pertinent part: "The state cannot appeal from a verdict of acquittal." In *State v. Baskin*, 301 So. 2d 313 (La. 1974), the court held that the state could *not* appeal a judgment directing a verdict of acquittal in a jury case on the ground that the trial court erred in finding a "total lack of evidence" and therefore the trial court lacked authority to grant a directed verdict. Similarly, the court refused to exercise its supervisory jurisdiction.

29. 288 So. 2d 48 (La. 1973).

30. LA. CODE CRIM. P. art. 851(1).

court seems to have taken the opportunity, since a remand for resentencing was necessary,[31] to declare that the trial court has the authority to grant a new trial if not satisfied that the evidence proved the guilt of the accused beyond a reasonable doubt.[32] The court felt that the trial court's denial of the motion for a new trial on the "verdict contrary to the law and evidence" ground indicated a belief that "even on a motion for a new trial, the guilt of the accused [is] a question for the jury alone."[33]

The court cited the official revision comment to article 851 which clearly indicates that the redactors intended to vest the trial judge with broad discretion to order a new trial "if he feels that the jury was wrong in convicting the defendant."[34]

Justice Summers, disagreeing with the majority, felt that the spirit of Article XIX, § 9 of the Constitution of 1921 was violated by such subversion of the jury's verdict. He argued that the result meant the possible trial of a case "*ad infinitum* until the jury reaches a verdict acceptable to the judge."[35] While that point should be well taken by the trial courts, the writer submits that the trial court clearly must have the authority to upset jury verdicts which, although supported by some evidence, possibly even "sufficient" evidence, are unfair. Trial courts will be hesitant to substitute their judgment regarding the credibility of witnesses or the weight of the evidence for that of the jury. However, the trial court has the duty to do so in cases where it decides that the defendant has been wrongly convicted. The trial judge is in a position, unlike the appellate court, to assess all of the factors in light of his wisdom and experience. While great deference should be paid to jury verdicts, even where *reasonable* men could differ on the question of guilt beyond a *reasonable* doubt,[36] verdicts should be upset if the trial court feels that an accused has been wrongfully convicted.[37]

Effect of Failure to Move to Quash

In *State v. Woodfox*,[38] the defendant in proper person filed a

31. The mandatory delay in sentencing provided in La. Code Crim. P. art. 873 was not properly complied with by the court or waived by the defendant. 288 So. 2d at 51.

32. 288 So. 2d at 51.

33. *Id.* at 50.

34. La. Code Crim. P. art. 851, comment (d).

35. 288 So. 2d at 51.

36. *See* Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972).

37. The court also has the authority to grant a new trial where "the ends of justice would be served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right." La. Code Crim. P. 851(5).

38. 291 So. 2d 388 (La. 1974).

motion to quash his grand jury indictment. At the time he was represented by court-appointed counsel. Later, other counsel was retained by the defendant. The defendant, tried and convicted of murder, was sentenced to life imprisonment. No action on the motion to quash was ever taken.

On appeal, defense counsel argued that the court's failure to dispose of the motion prior to trial was error patent on the face of the record. The supreme court disagreed, holding that such an irregularity should have been objected to and a bill of exceptions reserved.[39] The court noted that former article 841 provided that failure to object and reserve a bill constituted a "waiver of the objection." Significantly, the court noted that the defendant was not precluded on proper showing from seeking relief by habeas corpus.

The court's approach seems eminently correct. By failing to follow the formal requisites, the defendant lost the opportunity to pursue the alleged error regarding the grand jury indictment on appeal. However, the defendant was not precluded from attempting to establish the error through habeas corpus proceedings in the district court. It is doubtful that the waiver provision of former article 841 would prevent an accused under these circumstances from raising a federal constitutional right in collateral proceedings.[40] Insofar as defendant's motion complained of violations of federal constitutional rights, his failure to object to the trial court's failure to dispose of the motion prior to trial would probably not serve to waive the defendant's right to complain.[41] The procedural default only served to prevent the complaint from being urged on appeal. It did not preclude the defendant "on proper showing"[42] from renewing his complaint in collateral proceedings.

---

39. The case was disposed of prior to Act 207 of 1974 amending various articles of the Code of Criminal Procedures and abolishing the bill of exceptions.

40. *See* Henry v. Mississippi, 379 U.S. 443 (1965); Morris v. Sullivan, 497 F.2d 544 (5th Cir. 1974); Marlin v. Florida, 489 F.2d 702 (5th Cir. 1974); Rivera v. Wainwright, 488 F.2d 275 (5th Cir. 1974); Lawrence v. Henderson, 478 F.2d 705 (5th Cir. 1973).

41. The court did not state specifically what grounds the defendant's motion alleged: "This motion appears in the record and basically alleges that the proceedings, investigations and findings of the Grand Jury were prejudicial and unfair." State v. Woodfox, 291 So. 2d 388, 389 (La. 1974).

42. *Id.* at 390. By "proper showing," the court has alluded to an interesting problem. In recent cases the United States Court of Appeals for the Fifth Circuit has addressed the problem. Morris v. Sullivan, 497 F.2d 544 (5th Cir. 1974); Marlin v. Florida, 489 F.2d 702 (5th Cir. 1974); Rivera v. Wainwright, 488 F.2d 275 (5th Cir. 1974). In those cases, the accused, having failed to follow required state procedures in complaining of the constitutionality of the jury venire selection procedures, sought to

In *State v. Kibby*,[43] the accused filed a motion in arrest of judgment alleging that the tribunal which tried him did not conform with the constitutional mandate of Article VII, § 41 of the Constitution of 1921.[44] His complaint was that the petit jury venire included women who had not filed a written declaration of their desire to be subject to jury service. None of the women objected to service, but, by stipulation, it was agreed that none had filed a declaration of desire to be subject to service.

The supreme court held that the ground for arrest of judgment[45] relied on by the defendant dealt only with "the type of tribunal (judge or jury)"[46] which must try the various types of cases, and "where juries are required, the size and number of jurors that must concur for a verdict."[47] The court concluded that such a complaint, if not raised by motion to quash, is waived, citing article 535.[48] Because no motion to quash was filed, the court held that the alleged error was waived.

It was rather interesting that the defendant objected to the *inclusion* of women who had not filed a written declaration. The usual complaint is the reverse.[49] Nevertheless, the court's treatment of the

attack the convictions collaterally in federal habeas corpus. The court of appeals, citing *Davis v. United States*, 411 U.S. 233 (1973), required the habeas petitioner who failed to follow required state procedures to show why the claim was not timely and properly raised. The Fifth Circuit cases prior to *Davis* had held that "a jury discrimination claim barred by a state procedural timeliness rule could be presented initially on federal habeas corpus absent proof by the state of a Fay v. Noia . . . deliberate bypass, a conscious, knowing and strategic waiver." Morris v. Sullivan, 497 F.2d 544, 545 (5th Cir. 1974). In *Morris*, the court noted that "[p]etitioners did not allege that their court-appointed attorneys were incompetent . . . that the jury discrimination was covert and undiscoverable, or that any other form of 'cause' for the omission existed. . . ." *Id.* Because the habeas petitioners failed timely to raise their claims in state court or to show cause why they were not timely raised, the district court's finding that petitioners waived their rights to complain was upheld. *Id.*

The Fifth Circuit's analysis of the problem should aid the Louisiana supreme court in determining when "a proper showing" has been made establishing the Louisiana habeas petitioner's right to avoid the statutory waiver in LA. CODE CRIM. P. art. 535(D).

43. 294 So. 2d 196 (La. 1974).

44. La. Const. art. VII, §41 (1921) provides in pertinent part: "[N]o woman shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service."

45. LA. CODE CRIM. P. art. 859(4) provides: "The tribunal that tried the case did not conform with the requirements of Section 41 of Article VII of the Louisiana Constitution."

46. 294 So. 2d at 199.

47. *Id.*

48. *Id.*

49. *See* Healy v. Edwards, 363 F. Supp. 1110 (E.D. La. 1973), *prob. juris. noted*,

complaint here is significant. Clearly, insofar as only state procedures are involved, as opposed to federal constitutional rights, the court is correct in holding the defendant to the waiver standard outlined by state law.[50] The court's decisions in *State v. Kibby* and *State v. Woodfox* are thus consistent.

ERROR PATENT ON THE FACE OF THE RECORD

In *City of Baton Rouge v. Norman*,[51] the defendant appealed to the district court following his conviction in city court. During the second trial, after the city ordinance in question was introduced into evidence in district court, the defendant moved to quash on the ground that the city ordinance was unconstitutional. The defendant was convicted in the district court and the supreme court granted writs of review.

The supreme court noted that article 535[52] requires the filing of a motion to quash prior to trial. However, the court stated:

> [F]undamental grounds such as the invalidity of the statute upon which the prosecution is based are not waived by failure to urge them by motion to quash prior to trial. To the contrary, the validity of the statute upon which the prosecution is based is 'within the scope of appellate review without prior objection, under Art. 920(2), since it is an error discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence.'[53]

The court then proceeded to analyze the merits of the defendant's contentions resolving them against him.

Because the court was precluded from considering the untimely motion to quash, the court properly had jurisdiction to consider the issue only under the theory adopted as error patent on the face of the record.[54] As the official revision comment to article 535 notes, the validity of the statute on which the prosecution is based can be raised

94 S. Ct. 1405 (1974); State v. Taylor, 282 So. 2d 491 (La. 1973), *prob. juris. noted*, 94 S. Ct. 1405 (1974).

50. *See* LA. CODE CRIM. P. art. 535(D).

51. 290 So. 2d 865 (La. 1974).

52. LA. CODE CRIM. P. art. 535(A)(1) provides: "A motion to quash may be filed of right at any time before commencement of trial, when based on the ground that: (1) The offense charged is not punishable under a valid statute."

53. 290 So. 2d at 867.

54. LA. CODE CRIM. P. art. 920(2) gives the supreme court jurisdiction to review "[a]ny error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence."

in a motion in arrest of judgment.[55] The comments to article 362 suggest that the unconstitutionality of the statute under which the accused is in custody can also be raised in habeas corpus proceedings.[56]

The court was correct in considering the merits of the defendant's arguments regarding the constitutionality of the statute, although not properly presented in the court below. For the court to be consistent with its theory supporting the result in *Norman*, the defendant for the first time on appeal should be permitted to raise the constitutionality of the statute under which he was prosecuted. Errors falling within the scope of article 920(2) do not have to be presented to the trial court. As the official revision comment to article 535 indicates, such fundamental questions as the constitutionality of a statute should be considered when raised, although raised for the first time on appeal.[57]

MOTION TO SUPPRESS—STATE'S RIGHT TO SEEK REVIEW

In *State v. Mallet*,[58] the trial court granted the defendant's motion to suppress. The state first applied for writs, then moved to

55. LA. CODE CRIM. P. art. 859(2) provides that judgment shall be arrested if "[t]he offense charged is not punishable under a valid statute."

56. LA. CODE CRIM. P. art. 362, comment (h).

57. The theory adopted by the court has nothing to do with the right to raise the issue in arrest of judgment under LA. CODE CRIM. P. art. 859 or by habeas corpus under LA. CODE CRIM. P. art. 362 because these procedural devices were not used, although available. Habeas corpus requires "custody." LA. CODE CRIM. P. arts. 353, 362; State *ex rel* Jackson v. Henderson, 260 La. 90, 255 So. 2d 85 (1971). The motion in arrest must be "filed and disposed of before sentence." LA. CODE CRIM. P. art. 861. Conceivably, a case could arise in which habeas corpus or motion in arrest would not be available either due to procedural default in failing to properly file the motion in arrest or because the sentence did not impose "custody" as interpreted by courts. In such a case, the supreme court would have to consider the issue on direct review (by appeal or writs) or leave the defendant without an opportunity to raise the issue. If the supreme court had refused to consider the matter on direct review and affirmed, relegating the defendant to his remedy by habeas corpus, such refusal would have been inappropriate. The court had a full record on which to evaluate the constitutionality of the ordinance. When dealing with the constitutionality of a *statute*, however, a record or showing may have to be established in the trial court without which proper review would be impossible. If such is the case, habeas corpus is the only appropriate means to establish a record and present the issue.

Although it is better for all issues to be first presented to trial courts, when the constitutionality of a statute is involved a special situation exists. The constitutions have shown special concern for questions of constitutionality of statutes. If the trial court declares a "law or ordinance" unconstitutional the appellate, and not merely the supervisory, jurisdiction of the supreme court can always be invoked. LA. CONST. art. V, § 5; La. Const. art. VII, §10 (1921).

58. 284 So. 2d 761 (La. 1973).

appeal. The supreme court denied writs and then dismissed the appeal as having been improvidently granted. The court held that the state has no right to appeal adverse rulings in motions to suppress. The state's only remedy in such cases is to invoke the supreme court's supervisory jurisdiction by application for writs of certiorari.[59]

Article 921(B) outlines certain adverse rulings which are appealable by the state.[60] The motion to suppress is not listed. Although the list is not exclusive, the granting of a motion to suppress in theory does not finally dispose of a case, since the states could still bring the accused to trial. However, in many instances, the state's crucial evidence may be suppressed, effectively terminating successful prosecution of the case. If a motion to suppress is sustained in a federal prosecution, the United States Attorney may appeal the district court's ruling to the court of appeal in certain cases.[61] The evidence suppressed must have been crucial and the appeal must not have been taken for delay. Louisiana should consider some such remedy.[62] Although the supreme court seriously and thoroughly reviews applications by the state for writs from rulings suppressing evidence, an appellate remedy might improve the administration of criminal justice.[63]

---

59. LA. CONST. art. V, §5; La. Const. art. VII, §10 (1921).

60. LA. CODE CRIM. P. art. 912(B) provides: "The state cannot appeal from a verdict of acquittal. Adverse judgments or rulings from which the state may appeal include, but are not limited to judgments or rulings on: (1) A motion to quash an indictment or any count thereof; (2) A plea of time limitation; (3) A plea of double jeopardy; (4) A motion in arrest of judgment; (5) A motion to change the venue; (6) A motion to recuse."

61. 18 U.S.C. § 3731 (1948), *as amended*, 18 U.S.C. § 3731 (Supp. 1971). For an excellent discussion of alternatives adopted by various jurisdictions, see ABA STANDARDS, CRIMINAL APPEALS § 1.4 (1970): "(a) The prosecution should be permitted to appeal in the following situations: . . . (iii) from pretrial orders that seriously impede, although they do not technically foreclose, prosecution, such as orders granting pretrial motions to suppress evidence or pretrial motions to have confessions declared involuntary and inadmissible."

62. There may be a problem created by LA. CONST. art. V, §5 with respect to any appeal to the supreme court by the prosecution except in instances where a law or ordinance is declared unconstitutional. This question should be studied if legislation is proposed.

63. The ABA obviously felt that it would. Citing the President's Commission on Law Enforcement and Administration of Justice, the reporters' comments state: "The Commission reasoned that the law of search and seizure and of confessions is uncertain, that the issue of admissibility of such evidence is of great significance to both prosecution and defense, and that therefore lower court decisions restricting police conduct should be open to testing on appeal. If such restrictive decisions are not appealable, the Commission found, prosecution officials would either have to abandon the practice without an authoritative appellate ruling or have to continue the practice

APPEALS OF GUILTY PLEAS

In *State v. Torres*,[64] defendant entered a plea of guilty to aggravated crime against nature. He appealed based on a bill of exception reserved to the denial of his motion to suppress a confession given to arresting officers. On appeal, the supreme court affirmed, refusing to consider the merits of the ruling denying the motion to suppress. The court held that the guilty plea waived all non-jurisdictional defects. The court's review was limited to jurisdictional defects and to the validity of the guilty plea itself.[65] The defendant's complaint regarding validity of the confession, being a non-jurisdictional defect, was waived by his guilty plea.[66] On the record before it, the court determined that the defendant's plea was not conditioned on his right to have his objection to the confession reviewed on appeal. The court found that the plea was "knowingly and voluntarily made . . . after full compliance with Boykin v. Alabama. . . ."[67]

Justices Tate and Barham expressed the idea that the practice of permitting appeals of guilty pleas to review evidentiary rulings made prior to the pleas would "encourage pleas of guilty when the principal evidentiary issue is disposed of by a ruling on a preliminary motion and hearing."[68] Such a procedure would facilitate handling

despite the lower court's decision in the hope of a future trial court decision sustaining the practice from which a defense appeal might produce an appellate court ruling." ABA STANDARDS, CRIMINAL APPEALS §1.4, Comment (b) (1970).

64. 281 So. 2d 451 (La. 1973).

65. The court has reviewed guilty pleas on appeal from the plea in light of the standards in *Boykin v. Alabama*, 395 U.S. 238 (1969). *See* State v. Willis, 279 So. 2d 192 (La. 1973); State v. Allen, 263 La. 123, 267 So. 2d 544 (1972).

66. Alford v. North Carolina, 400 U.S. 25 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Brady v. United States, 397 U.S. 742 (1970); State v. Foster, 263 La. 956, 269 So. 2d 827 (1972).

67. State v. Torres, 281 So. 2d 451, *aff'd on rehearing*, 281 So. 2d 455, 456 (La. 1973). However, the court noted that its ruling did not foreclose the defendant from "seeking further relief, upon proper showing, by way of habeas corpus." 281 So. 2d at 456. This remark was obviously based on the defendant's contention that his guilty plea was not voluntarily made. The court said: "It is contended by defendant that his guilty plea was not entered freely and voluntarily. This contention is based on the allegations that there was a stipulation entered into between the accused and the State to the effect that the confession was an important part of the State's case; and that counsel for the accused stated to the court and the State his intention to appeal the bills of exceptions previously reserved. Based upon the record presently before us, we do not agree with the position of defendant on this point . . . ." *Id.*

The setting aside of the plea on the basis of the non-compliance with a prior agreement is, of course, a separate matter, having nothing to do with the correctness of the trial court's ruling on the admissibility of the confession.

68. 281 So. 2d at 455 (Barham, J., dissenting). *See also id.* (Tate, J., concurring).

criminal cases where the principal issue is the admissibility of certain evidence. In these situations both the state and the accused may avoid the needless expense of trial if the only issue is the validity of the trial court's denial of a motion to suppress. Such procedures have been established legislatively in other jurisdictions,[69] and their merits should be considered in Louisiana.[70]

69. *See* ABA STANDARDS, CRIMINAL APPEALS § 1.3, Comment (c) (1970).

70. Although Justices Tate and Barham in *State v. Torres* expressed the view that such procedures are within the scope of Louisiana's present Code of Criminal Procedure, the majority obviously disagrees. In *United States v. Sepe*, 486 F.2d 1044, *aff'g* 474 F.2d 784 (5th Cir. 1973) the court disapproved of the use of conditional pleas of guilty, or nolo contendere to allow an appeal on non-jurisdictional grounds (such as the trial court's ruling on a motion to suppress). *See also* United States v. Mizell, 488 F.2d 97 (5th Cir. 1973).

However, in *United States v. Mendoza*, 491 F.2d 534 (5th Cir. 1974), in which the defendants unsuccessfully moved to suppress narcotics, the defendants did not plead guilty but followed a different procedure accomplishing substantially the same result. Defendants and the government filed a stipulation for the trial of the defendants, "which stipulation admitted in detail all the facts necessary to support a finding of guilt by the district court of the charges contained in the indictment." 491 F.2d at 536. In response to the stipulation, the trial court adjudged the accuseds guilty. They appealed, based upon the denial of their pretrial motion to suppress. On appeal, the court of appeals, although affirming the conviction, considered the merits of the defendants' contentions regarding the validity of the search and seizure. There is no reason why prosecutors and defense counsel in Louisiana criminal cases could not follow the same procedures. LA. CONST. art. I, §17 allows the defendant to waive trial by jury in all but capital cases. With such a waiver and stipulation, or in addition possibly submission of the case on the basis of the evidence taken at suppression hearings or preliminary hearings, the trial court could adjudge the defendant guilty. This would provide the result sought by the defendant in *State v. Torres*—an appeal of pretrial rulings without the expense to both parties of a trial.